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Khor Chin Miaw v Frank Theodorus Van de Ven

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HIGH COURT (GEORGETOWN) — PETITION NO PA-33–334–09 OF 2018
AZIZAN MD ARSHAD JC
12 SEPTEMBER 2022

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Family Law — Divorce — Decree nisi — Decree nisi granted and made absolute — Petitioner wife ('PW') obtained ex parte application to be exempted from ss 48(1)(c) and 106 of Law Reform (Marriage and Divorce) Act 1976 ('LRA') — Respondent husband ('RH') applied to vacate all ex parte orders — Whether court had jurisdiction to issue decree nisi under s 48 of LRA — Whether petition filed less than two years after PW came back to Malaysia — Whether decree nisi could be overturned through appeal or application — Whether there was delay in RH filing application — Law Reform (Marriage and Divorce) Act 1976 ss 48 & 49

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The respondent husband ('RH') was a citizen of the Kingdom of Netherlands while the petitioner wife ('PW') was a Malaysian citizen. They were married in the Netherlands and the marriage was registered at the Malaysian Embassy at The Hague on 29 August 2017. They were blessed with a son by the name of Felix Khor Van de Von ('Felix'). At all material times of the marriage up until February 2018, the both of them had resided in Belgium. The PW, RH and Felix had relocated to the Caribbean Island of Aruba ('Aruba') in February 2018. Unfortunately, while in Aruba, the relationship between the PW and RH broke down. The PW filed a petition in the Court of First Instance of Aruba seeking, amongst others, an order to bring Felix to Malaysia. The Aruban court allowed the PW to bring Felix to Malaysia. In Malaysia, the PW had filed a single petition for a divorce on 5 September 2018 which was merely four months after leaving Aruba. Decree nisi was granted and became a decree nisi absolute. The PW had obtained an ex parte application to be exempted from ss 48(1)(c) and 106 of the Law Reform (Marriage and Divorce) Act 1976 ('LRA'). The RH filed an application ('encl 33') to vacate all ex parte orders based on non-compliance and the court's jurisdiction under ss 48, 49 and 106 of the LRA. The issues for consideration were: (a) whether the court had jurisdiction to issue a decree nisi under s 48 of the LRA; (b) whether the petition was filed less than two years after the PW came back to Malaysia; (c) whether a decree nisi could be overturned through an appeal or application; and (d) whether there was a delay in the RH filing the application.

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Held, allowing encl 33 with no order to costs:

(1) Section 48 of the LRA gave the court the power to make a decree of divorce only 'where the domicile of the parties to the marriage at the time when the petition is presented is in Malaysia'. The PW did not meet the requirements set out in the LRA for the court to grant the Malaysian decrees. The PW acquired the RH's domicile, which was Belgium (see paras 13, 17 & 20).

(2) Whether the issue of domicile under s 48(c) of the LRA could be exempted, the PW must show that the PW had been deserted by the RH or had been ordinarily resident in Malaysia for a period of two years before the filing of the proceedings. The PW left the RH and not that the PW had been deserted by the RH. They were together in Aruba before the PW deserted the RH and came back to Malaysia. The PW's claim that she could not contact the RH was false, and it was supported by the immigration officer's endorsement on her passport. It was shown that the PW was with the RH in Aruba for four months before she came back to Malaysia. Therefore, the application to dispense with the mandatory procedure under ss 48 and 49 of the LRA could not be sustained. The PW did not disclose all the material facts before the court. The order was irregularly obtained and must be set aside. The PW had adopted the RH's domicile and failed to comply with s 49 of the LRA (see paras 25–26 & 30–31).

(3) The PW objected to this application by submitting that this court could not overturn this decree nisi by way of application but must be through appeal. According to the case of *Eu Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ 37 and *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393, there were exceptions to the general rule. The exceptions were: (a) to correct errors in expressing the intention of the court; (b) judgment obtained by fraud; and (c) judgment obtained is null and void on ground of illegality or lack of jurisdiction. Therefore, an absolute decree nisi could be altered, varied, or set aside by way of an application if it could be proved that there were errors, fraud, or lack of jurisdiction (see paras 32 & 36).

(4) All the orders were issued ex parte. The time taken by the husband was reasonable. On top of that, an ex parte order was not a final order and could be set aside. The allegations that the wife did not know the whereabouts of the husband contradicted each other. The PW had been granted with a decree nisi to be made absolute immediately. Therefore, there was no chance for the RH to take any action before the dissolution of marriage took place. There was no 'unexplained delay' and there were only gaps of two years and ten months between the decree nisi being made absolute and the application to set aside the ex parte order being filed by the RH (see paras 38, 43 & 45).

[Bahasa Malaysia summary

Responden suami ('RS') adalah warganegara Belanda manakala pempetisyen isteri ('PI') adalah warganegara Malaysia. Mereka telah berkahwin di Belanda dan perkahwinan itu didaftarkan di Kedutaan Besar Malaysia di The Hague pada 29 Ogos 2017. Mereka dikurniakan seorang anak lelaki bernama Felix Khor Van de Von ('Felix'). Pada setiap masa material perkahwinan sehingga Februari 2018, mereka berdua telah menetap di Belgium. PI, RS dan Felix telah berpindah ke Pulau Caribbean Aruba ('Aruba') pada Februari 2018. Malangnya, semasa di Aruba, hubungan antara PI dan RS gagal. PW memfailkan petisyen di Court of First Instance of Aruba memohon, antara lain, perintah untuk membawa Felix ke Malaysia. Mahkamah Aruba membenarkan PW membawa Felix ke Malaysia. Di Malaysia, PI telah memfailkan petisyen tunggal untuk perceraian pada 5 September 2018 iaitu hanya empat bulan selepas meninggalkan Aruba. Dekri nisi telah diberikan dan menjadi dekri nisi mutlak. PW telah mendapatkan permohonan ex parte untuk dikecualikan daripada ss 48(1)(c) dan 106 Akta Membaharui Undang-undang (Perkahwinan dan Perceraian) 1976 ('LRA'). RH memfailkan permohonan ('lampiran 33') untuk membatalkan semua perintah ex parte berdasarkan ketidakpatuhan dan bidang kuasa mahkamah di bawah ss 48, 49 dan 106 LRA. Isu-isu untuk pertimbangan adalah: (a) sama ada mahkamah mempunyai bidang kuasa untuk mengeluarkan dekri nisi di bawah s 48 LRA; (b) sama ada petisyen itu difailkan kurang daripada dua tahun selepas PI pulang ke Malaysia; (c) sama ada dekri nisi boleh dibatalkan melalui rayuan atau permohonan; dan (d) sama ada terdapat kelewatan dalam RS memfailkan permohonan.

Diputuskan, membenarkan lampiran 33 tanpa perintah kepada kos:

(1) Seksyen 48 LRA memberikan mahkamah kuasa untuk membuat dekri perceraian hanya 'jika domisil bagi pihak-pihak kepada perkahwinan itu pada masa petisyen itu diserahkan ialah di Malaysia'. PI tidak memenuhi syarat yang ditetapkan dalam LRA untuk mahkamah memberikan dekri Malaysia. PI memperoleh domisil RS, iaitu Belgium (lihat perenggan 13, 17 & 20). Sama ada isu domisil di bawah s 48(c) LRA boleh dikecualikan, PI mesti menunjukkan bahawa PI telah ditinggalkan oleh RS atau telah lazimnya bermastautin di Malaysia untuk tempoh dua tahun sebelum pemfailan daripada prosiding itu. PI keluar meninggalkan RS dan bukannya PW ditinggalkan RS. Mereka bersama di Aruba sebelum PI meninggalkan RS dan kembali ke Malaysia. Dakwaan PI bahawa dia tidak dapat menghubungi RS adalah palsu, dan ia disokong oleh pengesahan pegawai imigresen pada pasportnya. Ditunjukkan bahawa PI berada bersama RS di Aruba selama empat bulan sebelum dia pulang ke Malaysia. Oleh itu, permohonan untuk mengetepikan prosedur mandatori di bawah ss 48 dan 49 LRA tidak dapat dikekalkan. PI tidak mendedahkan semua fakta material di

hadapan mahkamah. Perintah itu diperoleh secara tidak teratur dan mesti diketepikan. PI telah menerima pakai domisil RS dan gagal mematuhi s 49 LRA (lihat perenggan 25–26 & 30–31).

(2) PI membantah permohonan ini dengan mengemukakan bahawa mahkamah ini tidak boleh membatalkan dekri nisi ini melalui permohonan tetapi mestilah melalui rayuan. Menurut kes *Eu Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ 37 dan *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393, terdapat pengecualian kepada peraturan am. Pengecualian adalah: (a) untuk membetulkan kesilapan dalam menyatakan hasrat mahkamah; (b) penghakiman yang diperoleh melalui penipuan; dan (c) penghakiman yang diperolehi adalah batal dan tidak sah atas alasan menyalahi undang-undang atau kekurangan bidang kuasa. Oleh itu, dekri nisi mutlak boleh dipinda, diubah, atau diketepikan dengan cara permohonan jika dapat dibuktikan bahawa terdapat kesilapan, penipuan, atau kekurangan bidang kuasa (lihat perenggan 32 & 36).

(3) Semua perintah dikeluarkan secara ex parte. Masa yang diambil oleh suami adalah munasabah. Selain itu, perintah ex parte bukanlah perintah terakhir dan boleh diketepikan. Dakwaan bahawa si isteri tidak mengetahui keberadaan si suami bercanggah antara satu sama lain. PI telah diberikan dekri nisi untuk dijadikan mutlak serta-merta. Oleh itu, tiada peluang untuk RS mengambil sebarang tindakan sebelum pembubaran perkahwinan berlaku. Tiada 'kelewatan yang tidak dapat dijelaskan' dan hanya terdapat jurang dua tahun dan sepuluh bulan antara dekri nisi dibuat secara mutlak dan permohonan untuk mengetepikan perintah ex parte yang difailkan oleh RS (lihat perenggan 38, 43 & 45).]

Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)
C v A [1998] 6 MLJ 222; [1998] 4 CLJ 38, HC (refd)
Chow Chuan Fat v Yeo Chai Seng & Ors [2018] MLJU 914; [2017] 1 AMR 676, HC (refd)
Eu Finance Bhd v Lim Yoke Foo [1982] 2 MLJ 37, FC (refd)
Gan Eu Gin (L) & Anor, Re [2019] 7 MLJ 430, HC (refd)
Gurcharan Singh a/l Karnal Singh v Mninder Kaur a/p Piara Singh [2010] 6 MLJ 405, HC (refd)
Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143, FC (refd)
Huang Moy (p) v Ang Cha Hooi [2021] 5 MLJ 337, CA (refd)
Kanmani v Sundarampillai [1957] 1 MLJ 172 (refd)
Khaw Poh Chuan v Ng Gaik Peng & Ors [1996] 1 MLJ 761; [1996] 1 AMR 909, FC (refd)

Kiranjit Kaur a/p Kalwant Singh v Chandok Narinderpal Singh [2009] MLJU 1241, HC (refd)
Khoo Kay Peng v Pauline Chai Siew Phin [2015] MLJU 158, HC (refd)
Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 316, CA (refd)
Low Choon Kung v Tham Chan Kum [2004] SGDC 139 (refd)
Liew Nyuk Ching v Jong Khee Kie [2013] 4 MLJ 930, HC (refd)
MacQuire (M) Sdn Bhd v HSBC Bank Malaysia Bhd & Anor and another appeal [2007] 7 MLJ 139; [2007] 6 AMR 188, CA (refd)
Melvin Lee Campbell v Amy anak Edward Sumek [1988] 2 MLJ 338 (refd)
Neduncheliyan Balasubramaniam v Kohila Shanmugam [1997] 3 MLJ 768; [1997] 4 CLJ 676, CA (refd)
Ng Boon Chwee & Anor [2018] MLJU 737, HC (refd)
Ng Say Chuan (H) v Lim Szu Ling (W) and another application [2010] 4 MLJ 796, HC (refd)
Pachayamah a/p Pachaiappan v Guenda Raju a/l Karuppia [2022] MLJU 984, HC (refd)
Prasert Wongphattarakul and Poh Bee Bee [1996] MLJU 276, HC (refd)
Selvam Holdings (M) Sdn Bhd v Grant Kenyon & Eckhardt Sdn Bhd (BSN Commercial Bank Malaysia Bhd & Ors, Intervenors) [2003] 1 MLJ 251; [2003] 1 AMR 439, HC (refd)
Siah Teong Woei v Janet Traynor [2010] 2 MLJ 820, HC (refd)
Tan Guan Hock v Khor Chai Heah [1990] 1 MLJ 422; [1990] 1 CLJ Rep 308, SC (refd)
Tenaga Nasional Bhd v Tan Sooi Lek @ Tan Choon Guan & Ors [2022] 4 MLJ 236, FC (refd)
Wong Cheng Ping v Chin Guan Seng @ Tan Guan Seng [2010] MLJU 226; [2010] 10 CLJ 743 (refd)
Yamamoto Ryoji & Anor, Re [2021] 8 MLJ 386, HC (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 ss 48, 48(1), (1)(c), 49, 49(1), 106

WB Chuah (Ng Kee Wei & Co) for the petitioner.
Lam TH (Kevin & Co) for the respondent.

Azizan Md Arshad JC:

[1] This court on 26 August 2022, allowed encl 33 with no order to costs. The petitioner had appealed to the Court of Appeal. These are my grounds of judgment. The appellant and the respondent are to be referred to as they were in the High Court.

[2] The defendant filed a notice of application dated 11 February 2022 (encl 33) for the following orders:

(a) to strike out the divorce petition dated 4 September 2018;

(b) to set aside the court order and decree nisi dated 21 February 2019 and certificate to make decree absolute dated 1 April 2019;

(c) that the entry in the register of marriage at the National Registration Department (Marriage and Divorce Department) of Malaysia relating to the marriage of the petitioner and respondent be marked with the word 'married';

(d) that the Registrar-General be directed with the power to cause the entry in the register of marriage at the National Registration Department (Marriage and Divorce Department) of Malaysia relating to the marriage of the petitioner and respondent to be marked with the word 'married';

(e) costs of application to be borne by the petitioner; and

(f) any other relief that this honourable court deemed fair and reasonable.

CAUSE PAPERS

[3] The petitioner and the respondent refer to the following cause paper:

(a) petition for divorce dated 5 September 2018 ('encl 1');

(b) decree nisi dated 21 February 2019 ('encl 14');

(c) decree absolute dated 1 April 2019 ('encl 17');

(d) respondent's notice of application to set aside dated 11 February 2022 ('encl 33');

(e) respondent's affidavit in support affirmed by Frank Theodorus Van de Ven on 20 January 2022 ('encl 34');

(f) petitioner's affidavit in reply affirmed by Khor Chin Miaw on 21 April 2022 ('encl 36'); and

(g) respondent's affidavit in reply affirmed by Frank Theodorus Van de Ven on 16 Mei 2022 ('encl 37').

BACKGROUND FACTS

[4] At all material times, the respondent husband ('RH') is a citizen of the Kingdom of Netherlands having a service address at St Luciestraat 14, 3631 Maasmechelen, Belgium. Petitioner wife ('PW') is a Malaysian Citizen.

[5] On 4 Julai 2017, the PW had married the RH in the Netherlands and the marriage registered at the Malaysian Embassy at The Hague on 29 August 2017. At all material times of the marriage up until February 2018, the both of them had resided in Belgium. They were blessed with a son by the name of Felix Khor Van de Ven on 23 Mei 2017 ('Felix'). A

[6] The PW, RH, and Felix had relocated to the Caribbean Island of Aruba ('Aruba') in February 2018 and planned to stay for the RH's new employment contract. Unfortunately, while in Aruba, the relationship between PW and RH had a problem and broke down. B C

[7] PW filed a petition in the Court of First Instance of Aruba ('the Aruban Petition') seeking, amongst others, an order to bring Felix to Malaysia. On 16 Mei 2018, the Aruban Court allowed the PW to bring Felix to Malaysia. ('Aruban Court Ruling'). Even though there is a pending appeal against the Aruban Court ruling, the PW brought Felix back to Malaysia. D

[8] In Malaysia, the PW, had filed a single petition for a divorce on 5 September 2018 which is merely four months after leaving Aruba. Decree nisi was granted on 21 February 2019 and became a decree nisi absolute on 1 April 2019. E

[9] In this case the PW has obtained an ex parte application to be exempted from ss 48(1)(c) and 106 Law Reform (Marriage and Divorce) Act 1976 ('LRA'). The order of decree nisi of 21 February 2019 and the certificate to make decree absolute of 1 April 2019 were both granted. F

[10] This application (encl 33) is filed to vacate all ex parte orders based on non-compliance and the court's jurisdiction under ss 48, 49, and 106 of the LRA 1976. G

ISSUES

Does this court have jurisdiction to issue a decree nisi under s 48 of the LRA 1976? H

Domicile

[11] The PW submits that RH's made this application pursuant to ss 48 and 49 of LRA 1976 based on the argument that this court does not have the jurisdiction to grant the decree absolute dated 1 April 2019 as when the divorce petition dated 5 September 2018 was filed, the petitioner and respondent did not domicile in Malaysia but in Belgium. I

[12] Both parties refer to s 48 of the LRA 1976 which states as follows:

Under section 48(1) of the Law Reform (Marriage and Divorce) Act 1976 ('LRA') the jurisdiction of this Court has been clearly established as follows:

(1) Nothing in this Act shall authorise the court to make any decree of divorce except —

(a) where the marriage has been registered or deemed to be registered under this Act; or

(b) where the marriage between the parties was contracted under a law providing that, or in contemplation of which, marriage is monogamous; and

(c) *(c) Where the domicile of the parties to the marriage at the time when the petition is presented is in Malaysia?* (Emphasis added.)

[13] Section 48 of the LRA gives the court the power to make a decree of divorce only 'where the domicile of the parties to the marriage at the time when the petition is presented is in Malaysia'. This court must satisfy itself that the domiciles of both parties were in Malaysia at the time the petition was presented.

[14] In the Supreme Court decision in *Tan Guan Hock v Khor Chai Heah* [1990] 1 MLJ 422 at p 424; [1990] 1 CLJ Rep 308 at p 311e-f, Gunn Chit Tuan SCJ (as he then was) observed:

... The petitioner would still have to prove and satisfy the court that both he and the respondent were domiciled in Malaysia at the time when the petition was presented before the court could exercise its powers under s 48 of the Law Reform (Marriage and Divorce) Act to grant any relief to the parties.

[15] In Tan Thiaw Chong J In *Melvin Lee Campbell v Amy anak Edward Sumek* [1988] 2 MLJ 338, also observed:

The provisions of s 48(1)(c) in my view requires that the court must be satisfied that at the time when the petition in the instant case was presented the domicile of both the petitioners was in Malaysia.

[16] The RH submits that at all material times, the PW was not domiciled in Malaysia and therefore cannot be granted the Malaysian decrees as a relief from this court due to the lack of jurisdiction as it clearly proved that the petitioner was not domiciled in Malaysia and, in fact, had spent minimal time in Malaysia over a duration of two years between 2016 and 2018 for only 53 days.

[17] Therefore, the LRA has set out the mandatory requirements, it will be at least two years before this court can grant relief. In this case, the PW does not meet the requirements set out in the LRA for this court to grant the Malaysian decrees.

[18] Other than s 48 of the LRA 1976, s 49 of the LRA 1976 provides exceptions to the 'domicile test'. These exceptions are granted to a wife to avoid the injustices contingent upon the strict adherence to the application of the principle that a wife does not have and cannot acquire a separate domicile of choice. This is provided in cases where the proceedings for divorce are commenced by a wife and not by a husband. Section 49 of the LRA 1976 provides as follows:

> (1) Notwithstanding anything to the contrary in paragraph 48(1)(c), the court shall have jurisdiction to entertain proceedings by a wife under this Part, although the husband is not domiciled or resident in Malaysia if —
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> (a) *the wife has been deserted by the husband,* or the husband has been deported from Malaysia under any law for the time being in force relating to the deportation of persons, and the husband was before the desertion or deportation domiciled in Malaysia; or
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> (b) *the wife is resident in Malaysia and has been ordinarily resident in Malaysia for a period of two years immediately preceding the commencement of the proceedings.*
>
> (2) In any proceedings in which the High Court has jurisdiction by virtue of this section, the issues shall be determined in accordance with the law which would be applicable thereto if the parties were domiciled or resident in Malaysia.
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> (3) In this section references to deportation from Malaysia shall be construed as including banishment or expulsion under any written law. (Emphasis added.)

[19] The PW submits that she is a Malaysian. She has a Malaysian passport, has a Malaysia National Identity Card and has been staying in Malaysia for 38 years in her 45 years of life. The petitioner wanted to divorce the RH and to permanently live and work in Malaysia, where the petitioner's family also resides.

[20] Based on the facts of this case, it is clearly shown that the PW acquires the husband's domicile, which in this case is Belgium. This was recognised by the Court of Appeal in the case of *Neduncheliyan Balasubramaniam v Kohila Shanmugam* [1997] 3 MLJ 768; [1997] 4 CLJ 676, held that:

> On the uncontested material before us we are of the opinion any Malaysian woman upon marriage will acquire her husband's domicile and until that marriage is lawfully dissolved she will retain the domicile of her husband. See *Halsbury's Laws of England* (4th Ed, Vol 8) para 431 at p 323.

[21] In the case of *Kanmani v Sundarampillai* [1957] 1 MLJ 172. This principle was also reiterated in the case of *Prasert Wongphattarakul and Poh Bee Bee* [1996] MLJU 276 wherein it was stated as follows:

> At common law, a married woman acquires her husband's domicile during the subsistence of the marriage. This common-law position is given statutory recognition in s 48(1)(c) of the Act by the requirement for the domicile of the *parties* to be in Malaysia (Emphasis added.) before the court can entertain proceedings for a decree of divorce. It is because of this reference to the single or common Malaysian domicile of the *parties*, which is predicated upon the wife having or acquiring the Malaysian domicile of the husband, that the parliament had found it necessary to enact s 49(1) of the Act to grant relief to a wife who has been deserted by her husband or whose husband has been deported from Malaysia, and whose husband was *before* the desertion or deportation domiciled in Malaysia (Emphasis added.), by enabling the wife to bring proceedings although the husband is not domiciled or resident in Malaysia at the time the petition is presented.

[22] In *Siah Teong Woei v Janet Traynor* [2010] 2 MLJ 820 the court held as follows:

> [14] In Malaysia, the law on domicile is similar to common law. As regard to a domicile of dependence, a woman takes the domicile of her husband upon marriage. In another word a married woman cannot acquire a domicile separate from that of her husband. *A married couple have therefore, only one domicile and that is the domicile of the husband. The logic for this dependence is because under common law, a husband and a wife are viewed as one entity. The woman takes her husband's domicile upon marriage and she retains it. She can abandon her husband's domicile but she has to prove and satisfy the court that the abandonment is permanent and unequivocal before the court can take cognisance of it.*

[23] In the case of *Khoo Kay Peng v Pauline Chai Siew Phin* [2015] MLJU 158, the court held that:

> However, the question now is whether the next requirement in s 48(1)(c) of the LRA for both parties to be domiciled in Malaysia at the time when the petition is presented can be fulfilled. This is in view of the Wife's assertion that she is now not domiciled in Malaysia, but in England. The burden of proof is on the Husband to prove that both he and the wife are domiciled in Malaysia

In our case, based on the facts of this case, the PW follows the RH's domicile.

Whether the petition was filed less than two years after the wife came back to Malaysia?

Condition and jurisdiction

[24] Section 49(1) of the LRA contains a provision and additional jurisdiction for the court to determine a wife's proceedings notwithstanding anything to the contrary in s 48(1)(c) if the wife has been deserted by the husband or if the wife is resident in Malaysia and has been ordinarily resident

in Malaysia for two years immediately preceding the commencement of the proceedings. A

[25] Therefore, in our case, whether the issue of domicile under s 48(1)(c) of the LRA can be exempted, the PW must show that the PW has been deserted by the RH or has been ordinarily resident in Malaysia for a period of two years before the filing of the proceedings. B

[26] Based on the facts of the case, the PW left the RH and not that the PW had been deserted by the husband. But in this case, the PW has been granted an order by the court to dispense with the conditions of two years and to refer to a conciliatory body under s 106 of the LRA. This application is to set aside the order as the RH contested it was obtained without the full disclosure facts of the PW. The RH in his affidavit has shown that, they were together in Aruba before his wife deserted him and came back to Malaysia. The PWs claim that she could not contact the RH was false, and it was supported by the immigration officer's endorsement on her passport. It was shown that the PW was with the husband in Aruba for four months before she came back to Malaysia. C D E

[27] In the case of *Gurcharan Singh a/l Karnal Singh v Mninder Kaur a/p Piara Singh* [2010] 6 MLJ 405, the court held:

> [48] The Malaysian court will assume jurisdiction if the marriage was registered in Malaysia and the parties are domiciled in Malaysia at the time of the commencement of the proceedings (s 48) or where the wife has been resident here in Malaysia for at least two years immediately preceding the commencement of filing for divorce in the case where the husband has deserted her (s 49).
>
> [49] *In light of* ss 48 and 49 of the LRA 1976*, the Malaysian court will have jurisdiction to dissolve this Malaysian marriage, where parties are of Malaysian domicile or in any event, where the wife continues to be resident here in Malaysia after the husband has deserted her …* (Emphasis added.)

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[28] In *C v A* [1998] 6 MLJ 222; [1998] 4 CLJ 38 the court held that:

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> … in relying on the provisos, including s 106(1)(vi) of the LRA, *the court to be satisfied with the existence of the exceptional circumstances which make reference to a conciliatory body impracticable,* a party can proceed to file a divorce petition.

[29] An application to the court by way of an originating summons for leave must be made before presenting the divorce petition. The application must be supported by an affidavit setting out the reasons and basis for the 'request, addressing the exceptional circumstances and hardship, the interests of any children, and whether any reconciliation will be possible'. I

(See *Kiranjit Kaur a/p Kalwant Singh v Chandok Narinderpal Singh* [2009] MLJU 1241 for what constitutes exceptional circumstances and hardship).

[30] Therefore, the application to dispense with the mandatory procedure under ss 48 and 49 of the LRA cannot be sustained if those facts were produced before the court. Based on the affidavits supporting this application, this court is satisfied that the PW did not disclose all the material facts before the court. The order was irregularly obtained and must be set aside.

[31] *Re Yamamoto Ryoji & Anor* [2021] 8 MLJ 386, the court held that:

> ... In the Nuraisyah Chua Abdullah, *Law Reform (Marriage and Divorce Act) 1976, Commentary and Cases* (2nd Ed), *the learned author commented that s 49 of the LRA is an exception to the general rule that only parties who are domiciled in Malaysia may a petition, be it contested or joint for divorce. However, this exception applies only in cases where the petition is filed by the wife (and not by a husband). If the marriage breaks down, and as a consequence, the wife returns to Malaysia, she may then file proceedings for divorce after residing in Malaysia for two years.* (Emphasis added.)

Based on the facts of our case, it can be concluded that the PW had adopted RH's domicile and failed to comply with s 49 of the LRA:

(a) The PW filed this proceeding only four months after returning to Malaysia;

(b) the PW left the RH;

(c) the petition was filed less than two years after the wife came back to Malaysia;

(d) in the divorce petition, the PW admitted that both of them had not cohabitated in Malaysia;

(e) PW and Felix only reside in Penang starting from 18 May 2018; and

(f) the PW did not dispute that both of them had been divorced in Belgium based on the court order dated 20 August 2019.

Can a decree nisi be overturned through an appeal or application?

Modes of application

[32] The PW objected to this application by submitting that this court cannot overturn this decree nisi by way of application but must be through appeal. The PW contends that, it is undeniable that both parties agreed to divorce. This is evident in the fact that the PW had obtained a decree absolute in this court on 22 March 2019 while the respondent obtained a divorce decree

in Belgium on 28 August 2019. The disagreement between the parties was only the relief granted by this court pursuant to this divorce petition filed.

[33] The PW submits that the only remedy for the respondent is to lodge an appeal and not to file this application to set aside the orders. However, it is the PWs submission that this method of lodging an appeal is also no longer available to the respondent as the time period of 30 days had lapsed.

[34] In the case of *Wong Cheng Ping v Chin Guan Seng @ Tan Guan Seng* [2010] MLJU 226; [2010] 10 CLJ 743, at p 751, where the High Court held, in obiter, as follows:

> [32] There is no provision in the Act for rescinding or setting aside a decree nisi that already has been made absolute. It appears to me that it is the intention of Parliament to preserve the integrity and finality of a decree nisi that already has been made absolute after three months. *As such, parties are not allowed to freely apply to the court at any time to rescind or set aside unless for very good reasons or in exceptional circumstances.* (Emphasis added.)

[35] In the case of *Ng Boon Chwee & Anor* [2018] MLJU 737, the court held that:

> [40] This court is of the considered view that since the Act is silent on the court's power to rescind a decree absolute following a decree nisi for dissolution of a marriage, *therefore, the general legal principles for setting aside a perfected judgment or order of a court shall apply in a case of decree absolute.*
>
> [41] It is said that 'when a judgment or order has been perfected or sealed ... the court is deemed to be functus officio and the general principle is that the court has no power under any application in the same action to alter, vary or set aside a judgment regularly obtained after it has been entered or an order after it has been drawn up' (see *Malaysia Civil Procedure* 2015, Vol 1, 565).
>
> [42] However, there are exceptions to the general rule. The exceptions are, inter alia, that (i) to correct errors in expressing the intention of the court; (ii) judgment obtained by fraud; (iii) judgment obtained is null and void on ground of illegality or lack of jurisdiction (see *Eu Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ 37 and *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393).

[36] According to the case of *Eu Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ 37 and *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393, there are exceptions to the general rule. The exceptions are:

(a) to correct errors in expressing the intention of the court;

(b) judgment obtained by fraud; and

(c) judgment obtained is null and void on ground of illegality or lack of jurisdiction

(see also *Ng Boon Chwee & Anor* [2018] MLJU 737)

Therefore, this court is of the opinion that an absolute decree nisi can be altered, varied, or set aside by way of an application if it can be proved that there are errors, fraud, or lack of jurisdiction.

Is there a delay in RH filing an application?

Time-framed

[37] In the case of *Huang Moy (p) v Ang Cha Hooi* [2021] 5 MLJ 337, the court held that:

> [28] In response, learned counsel for the respondent submitted there is no delay because the respondent was never served with the decree nisi and the decree nisi absolute until today (as at the day this appeal was heard on 23 November 2020).
>
> [29] After hearing the parties' submission, we are not in agreement with the respondent. We agree with the appellant's submission that the respondent who had constantly in contact with his son must have known about the divorce much earlier than the year 2015. But the respondent did nothing. From the date the decree nisi was granted on 2 June 2010 to the date of the application on 8 December 2017, we agree there is an inordinate delay of more than seven years. It is trite law that the court will not lend assistance to a litigant who slept on his right.

[38] In our case, all of the orders were issued ex parte. The time taken by the husband is reasonable. On top of that, an ex parte order is not a final order and can be set aside. Based on the facts and evidence, the allegations that the wife did not know the whereabouts of the husband contradicted each other. *For example, in April 2018, they were together in Aruba, which was not proved that the husband had deserted her.*

[39] It is always that the burden is on the Applicant to prove, on the balance of probabilities, that exceptional circumstances are present to justify the court's intervention (see *Ng Say Chuan (H) v Lim Szu Ling (W) and another application* [2010] 4 MLJ 796; *Khaw Poh Chuan v Ng Gaik Peng & Ors* [1996] 1 MLJ 761; [1996] 1 AMR 909 (FC); *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd*).

[40] In *MacQuire (M) Sdn Bhd v HSBC Bank Malaysia Bhd & Anor and another appeal* [2007] 7 MLJ 139; [2007] 6 AMR 188, (CA), in consonance with the findings of *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143

(FC); *Badiaddin v Arab Malaysian Finance Berhad* and *Selvam Holdings (M) Sdn Bhd v Grant Kenyon & Eckhardt Sdn Bhd (BSN Commercial Bank Malaysia Bhd & Ors, intervenors)* [2003] 1 MLJ 251; [2003] 1 AMR 439; *Chow Chuan Fat v Yeo Chai Seng & Ors* [2018] MLJU 914; [2017] 1 AMR 676; that the jurisdiction to set aside such a judgment is not to be exercised as a matter of course but in limited circumstances. *It is only to be used where:*

(a) breach of the rules of natural justice;

(b) lack of jurisdiction;

(c) illegality, ie contravention of a substantive statutory provision;

(d) serious defects; or

(e) fraud.

[41] The burden lies on the RH to satisfy the court that the matter comes within the ambit of those aforesaid circumstances. The facts of the case must be considered by this court based on the affidavit filed by both parties. In the case of *Huang Moy (p) v Ang Cha Hooi* [2021] 5 MLJ 337 *the decree nisi and decree nisi absolute is reinstated when there is inordinate delay and no good reasons to be set aside.* In *Huang Moy (p) v Ang Cha Hooi* the court held that:

> To us, para 35 above show the respondent agrees that the marriage has irretrievably broken down and could not be saved. That the respondent can see their marriage is over with the presence of a third party. That the time has come for the respondent to accept the fact that their marriage should be dissolved no matter what his terms are. The appellant has remarry someone else. *The parties have been living apart for more than ten years (from 2008 until now). The delay in approaching the court. On top of that both the appellant and the respondent are now in their ripe old age of 70 years old. How much longer can both of them lived. We were of the considered view that these are the relevant factors that the High Court judge should have considered before setting aside the decree nisi and decree nisi absolute.* To us, for the appellant to start again the divorce proceedings for the second time is unduly harsh and unfair. *Given the circumstances the appellant is in, we are of the view that the respondent had no good reasons to set aside the decree nisi and decree nisi absolute.* On this ground alone, we took the view that the learned High Court judge had erred in setting aside the decree nisi and decree nisi absolute. (Emphasis added.)

[42] In the case of *Liew Nyuk Ching v Jong Khee Kie* [2013] 4 MLJ 930, where the decree nisi that was made absolute was set aside based on the merits of the case. In a Singapore case, *Low Choon Kung v Tham Chan Kum* [2004] SGDC 139, where it was held that:

> Decree absolute was set aside. This decision illustrates not only that the decree absolute may be set aside, but the mere fact that a decree absolute had been issued is not an automatic bar to the rescission of the decree nisi ... However, I am of the view that the court should have the power to rescind a decree absolute even if there

A has been procedural regularity in service, if circumstances exist which justify the rescission of the decree nisi. The reason for this that it would be wrong in principle if the court's ability to deal with a situation which warrants a rescission of the decree nisi (ie by rescinding the decree nisi) depended on whether a decree absolute happened to have been issued or not. Thus, if the court sees fit to rescind a decree B nisi, it should be able to do so, whether or not a decree absolute exists. If a decree absolute exists, then the court should also be able to rescind the decree absolute-indeed, if the decree nisi is rescinded, the decree absolute must also be rescinded, as the latter is an order which is issued to perfect the former, and should not be able to exist without it.

C

(see *Re Gan Eu Gin (L) & Anor* [2019] 7 MLJ 430).

[43] In our case, the PW has been granted with a decree nisi to be made absolute immediately. Therefore, there was no chance for the RH to take any D action before the dissolution of marriage took place. This issue has been commented on in the case of *Re Gan Eu Gin (L) & Anor* [2019] 7 MLJ 430as follows: 'It is also my considered view that *the three months period for the said decree nisi to be made absolute is a reasonable enough time to allow parties to appraise their respective situation prior to the absolute dissolution of the said* E *marriage taking place. It is a time period as prescribed by the Act as framed by the legislators.* The court is empowered to grant a lesser waiting period but not more than what is prescribed in the Act (s 61(1) of the Act). Consequently, the issue of abridging or enlarging the time period do not arise'.

F

[44] In the case of *Wong Cheng Ping v Chin Guan Seng @ Tan Guan Seng* [2010] MLJU 226, the court has considered the time taken and the lack of answers by the respondent as reasons to set aside the order. In *Wong Cheng Ping v Chin Guan Seng @ Tan Guan*, the court held that:

G The decree nisi was granted since the *respondent was absent and no answer had been filed by him.* The decree nisi has already been made absolute. The effect is that the petitioner and the respondent are already divorced. *It would require a very good reason for such divorce status of the parties to be reversed or disturbed. The petitioner should not be put in the predicament of an overnight change of her marital status when* H *she was at all times thinking that she was already divorced for more than seven years, only to get the rude shock that suddenly such divorce can now be set aside and the Divorce Petition re-heard just because, finally, the respondent has decided to take action. In the first place, the respondent has not given any good reason to the court as to why he did not file his answer to the divorce petition, or why he was not present in court on 22 July 1999* (see also the decision of Siti Norma Yaakob J (as she then was) in *Yeop Chooi Peng v* I *P Manogram a/l Packirisamy* [1988] 3 MLJ 274; [1988] 1 LNS 85). (Emphasis added.)

[45] In our case, there is no 'unexplained delay' and there were only gaps of two years and ten months between the decree nisi being made absolute and the

application to set aside the ex parte order being filed by the RH. If he failed to show any good reasons, the court would not entertain this application, as can be seen in the case of *Pachayamah a/p Pachaiappan v Guenda Raju a/l Karuppia* [2022] MLJU 984, where the court held that:

> [22] *In my view, where an order for dissolution of a marriage is made in the respondent's absence, the predominant consideration in deciding whether to set aside the order is the reason for the respondent's absence.* The reasons for a respondent's non-attendance must be seriously viewed in instances where the respondent's omission is deliberate.
>
> ...
>
> [42] There is no merit in the respondent's submission *he did not attend the hearing as he was unaware of the divorce proceedings. As his non-attendance was deliberate, it does not constitute a good reason to set aside the decree nisi and decree nisi absolute which are regularly-obtained orders.* (Emphasis added.)

[46] In *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 316, held that

> ... wherever there is any non-disclosure of any material fact in an ex parte application, that ex parte order must certainly be discharged or set aside on ground of the non-disclosure alone.

[47] The ex parte order issued against the RH is not a final order. In *Tenaga Nasional Bhd v Tan Sooi Lek @ Tan Choon Guan & Ors* [2022] 4 MLJ 236, the court held that:

> [34] Ex parte is a Latin expression which is used to signify something done or said by one person not in the presence of his opponent. In other words, ex parte applications are heard in the absence of the party against whom the order is sought. Ex parte orders are commonly sought in situation of urgency or where the purpose of the application would be frustrated if the other party were to have knowledge of the proceedings, and even, if necessary, before the writ is issued (Anandan Krishnan, *Words, Phrases & Maxims: Legally & Judicially Defined*, Lexis Nexis Vol 6E at para E0697; O 29 r 3 of the ROC 2012). In contrast, the legalese term inter partes refers to a hearing on notice to both parties. In this instance, both adversaries are given advance notice of the date and time of the hearing and are required to attend the hearing.
>
> [35] *Since an ex parte order is made in the absence of the opposing party and without the benefit of adversary argument, an ex parte order is not a final order.*

CONCLUSION

[48] Furthermore, the fact that both parties agreed to divorce is undeniable. The petitioner obtained an absolute decree from this honourable court on 22 March 2019, whereas the respondent obtained a divorce decree in Belgium on

28 August 2019. The only point of contention between the parties was the relief granted by this court in response to the divorce petition filed. They can, however, file a joint petition.

[49] The legal position is settled that where an order of the court has not been regularly obtained, any party is entitled as of right to have it set aside, ie *ex debito justitiae,* irrespective of the merits and without any terms. Such court power is inherent and does not require any statutory provision (see *Re Yamamoto Ryoji & Anor* [2021] 8 MLJ 386).

[50] In a nutshell, the said decrees were obtained improperly from this court, rendering them null and void. Based on the above-said facts and the application before me, this court granted the RH's application in encl 33 without a cost order.

Enclosure 33 allowed with no order to costs.

Reported by Nabilah Syahida Abdullah Salleh